87-167

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

HARRIET MAREK AND SAMUEL MAREK,
WIFE AND HUSBAND,

Petitioners

v.

MARPAN TWO, INC. AND BAHAMA CRUISE LINE, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVEIW

I. Whether the Appellee's failed to do all they reasonably could to warn Appellant of the existence and importance of the six month notice provision and one year statute of limitations provision in paragraphs 6(a) and 6(b) respectively of the passenger ticket, such that said provisions should not be enforced.

II. Whether the passenger ticket itself and the provisions contained therein constitute an unenforceable adhesion contract.

B. LIST OF ALL PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of this case.

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2. *Marek v. Marpan Two, Inc. and Bahama Cruise Lines, Inc.*, Opinion of the Court (3d Cir. May 1, 1987).

No.____

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Respondents

PETITION FOR WRIT OF CERTIORARI

F. STATEMENT OF JURISDICTION

1. The decree sought to be reviewed was entered in the United States Court of Appeals for the Third Circuit on May 1, 1987.

2. An Order denying Appellant's Petition for Rehearing en banc before the United States Court of Appeals for the Third Circuit was entered on May 22, 1987.

3. This Court is conferred with jurisdiction to review the above decree by Writ of Certiorari pursuant to 28 U.S.C.A. Section 1254 (1).

G. STATUTES INVOLVED

1. 46 U.S. C. Section 1836 (a)

Stipulations limiting time for filing claims and commencing suit.

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

H. STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Wife-Appellant sustained serious personal injuries in an accident caused by the Appelles' negligence which occurred aboard Appelless' vessel the S.S. Veracruz on March 18, 1983. The instant personal injury action was instituted on May 8, 1984, pursuant to the admiralty jurisdiction of the District Court below as set forth in 28 U.S.C. Section 1333 and the diversity jurisdiction as set forth in 28 U.S.C. Section 1332.

On July 15, 1986, the District Court below issued a Memorandum and Order which granted Summary Judgment against Appellants claim on the basis that the passenger tickets' one year limitation provision and six month notice provision effectively barred Appellant's claim.

The Mareks filed a Notice of Appeal from the Summary Judgment to the United States Court of Appeals for the Third Circuit on July 28, 1986. The Court of Appeals upheld the Summary Judgment in an Opinion dated May 1, 1987.

A Petition for Rehearing en banc was filed in the United States Court of Appeals for the Third Circuit on May 14, 1987. The Petition was denied on May 22, 1987.

Appellants now file this Petition for Writ of Certiorari in the United States Supreme Court seeking to overturn the decision of the Court of Appeals affirming the Summary Judgment for the reasons set forth herein.

II. FACTUAL BACKGROUND

Mrs. Marek and her friend Mrs. Toombs made arrangements through a club near her home in Russel, Pennsylvania to sail on Appellees' vessel the S.S. Veracruz which was scheduled to depart from Tampa, Florida on March 12, 1983. Mrs. Marek and Mrs. Toombs were given one ticket folder containing the provisions of the alleged carriage contract as they boarded. Mrs. Toombs retained possession of the folder.

Wife-Appellant was not afforded time to read the ticket folder before boarding, nor were the contents explained to her by Appellees.

The ticket folder issued by the Appellees was as is shown in the Appendix at pages A-27, except that as originally issued the folder contained an additional sheet of paper, the original ticket coupon, between the front and back covers. That coupon was removed by the ship's personnel. The actual ticket folder consists of a front cover and back cover, with carbon paper and a carbon copy of the ticket coupon between them. The color of the covers which contain the alleged "contract of carriage" are a light shade of brown while the printing thereon is a darker shade of the same color. In its actual form the black carbon paper and the ticket coupon completely cover the printed material on the inside of the back cover.

The subject clauses 6(a) and 6(b) appear on the inside of the back cover in 1/15th inch print. Although the provision purporting to require the institution of suit within one year of the accident is numbered as clause "6(b)", when lettered subparts of paragraphs are counted, it actually appears as the fourteenth (14th) paragraph. Moreover, the clauses appear in the ticket

folder in the position most likely to be overlooked, in the lower lefthand corner of the inside of the back cover, under the carbon paper and the ticket coupon.

Some time after boarding the S.S. Veracruz, Harriet Marek and Mrs. Toombs did scan the written material on the inside of the front cover of the ticket folder, although they did not read every word that was there because they found the print too small and mostly beyond their comprehension. They also glanced at the printed material on the outside of the back cover.

At no time within one year of her accident was Wife-Appellant aware of the existence of clauses 6(a) and 6(b) on the inside of the back cover of the ticket folder.

I. SUMMARY OF ARGUMENT

There are special and important reasons within the meaning of Rule 17 of the Supreme Court Rules why the Supreme Court of the United States should grant a review of this matter on writ of certiorari.

Rule 17.1 (a) provides that the Supreme Court will consider granting a writ of certiorari "when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter."

Rule 17.1 (c) provides that the Supreme Court will consider granting a writ of certiorari "when a . . . . . .federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal queston in a way in conflict with applicable decisions of this Court."

One federal question presented in this case is whether the warning placed on the cover of its ticket by Appellees was sufficient to permit the enforcement of the notice and claims limitation provisions which were placed inside the ticket pursuant to 46 U.S.C. Section 1836 (a).

As will be set forth in more detail herein, the Opinion of the Court of Appeals below is in conflict with the decisions of other federal courts of appeals on this same issue.

The opinion in *Silvestri*, 388 F.2d 11 (2d Cir. 1968), states that the carrier must do "all it reasonably could" to warn the passenger of both the existence and importance of the claims limitations provisions. By contrast, the opinion of the Appellate Court below backs off from this standard and states that "if taken literally, {it} is simply too rigid". *Marek v. Marpan Two Inc. and Marek v. Marpan Two Inc. and Bahama Cruise Line*, No. 86-1493 (3d. Cir. filed May 1, 1987) at 6. The Appellate Court instead applies a test of "reasonable communicativeness." *Id. at* 6.

Clearly these two standards are in conflict. The *Silvestri* standard protects the passenger by placing the burden on the carrier to bring these provisions limiting passenger's rights to his or her attention. *Silvestri* is thus consistent with the landmark decision of this Court in *The Majestic*, 166 U.S. 375, 17 S. Ct. 397, 41 L.Ed. 1039 (1897).

Conversely, the opinion in the Court below effectively removes the burden from the carrier and places it on the passenger to make himself or herself aware of the limitations provisions hidden inside the ticket. This is contrary to the intention and spirit of this Court's decision in the *The Majestic* and the Second Circuit's decision in *Silvestri*.

A second matter which the Court of Appeals below has failed to address is the threshold question of whether the ticket is an unenforceable adhesion contract.

For the foregoing reasons, it is respectfully requested that this Court grant the writ of certiorari in this case.

II. ARGUMENT

A. The Appellee's failed to do all they reasonably could to warn Appellant of the existence and importance of the six month notice provision and one year statute of limitations provisions in paragraphs 6(a) and 6(b) respectively of the passenger ticket, such that said provisions should not be enforced.

The issue of whether to enforce notice of claim and claim limitations provisions such as those contained in the instant ticket has been discussed at considerable length since the

landmark decision of this Court in *The Majestic*, 166 U.S. 375, 17S.Ct. 597, 41 L.Ed. 1039 (1897).

Courts which have decided this issue in various factual situations have been concerned that passenger cruise line tickets are adhesion contracts and that the limitations provisions are often buried inside the ticket.

Therefore, they have required that the carrier do "all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." *Silvestri vs. Italia Societa PerAzioni Di Navigazione*, 388 F. 2d 11, 17 (2d Cir. 1968), following *The Majestic*.

The Court of Appeals below has applied a watered down version of the *Silvestri* test which in essence serves to completely defeat the purpose that the *Silvestri* Court had in mind. The opinion of the Court below holds that,

> "As the district court recognized, however, this statement of legal test, if taken literally, is simply too rigid. There is no situation where, from hindsight, one could not imagine the shipowner doing some little bit more to draw attention to the limitation clause. . . . . Thus, even though the courts continue to use the "all it reasonably could" language, application of the standard involves notions of reasonableness and not hypothesizing some further step the shipowner could possibly have taken." *Marek*, at page 6.

The central purpose behind the "all it reasonably could" language in *Silvestri* and its progeny is to protect the passenger who has no opportunity to bargain with the carrier for the terms of the ticket contract. Thus, at a minimum, the tickets' cover warning must warn the passenger of "both the existence and importance" of the ticket provisions which limit their legal rights. *Mc Quillan v. Italia Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D.N.Y. 1974) *affd*. 516 F.2d. 896 (2d. Cir. 1975).

Appellants are not asking this Court to hypothesize some further step the shipowner could possibly have taken. The steps a shipowner must take when drafting a ticket's cover warning which will satisfy the *Silvestri* test are clear.

In order to place a passenger under constructive notice of the limitations provisions, the warning on the cover of the ticket must:

1. contain conspicuous language;

2. apprise the passengers that the contractual periods of limitation exist and;

3. inform the passengers of the importance of those limitations.

O'Connell v. Norwegian Carribean Lines, Inc., 639 F. Supp. 846 Ind. Ill. 1986).

The instant ticket's cover warning is as follows: "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH INSIDE. PLEASE READ CAREFULLY." Clearly this warning does not satisfy the second or third prongs of the test above. It neither apprises the passenger of the existence or importance of said provisions.

The *O'Connell* court held that a ticket cover containing among other things the words "PASSENGER CONTRACT" and "THE PROVISIONS ON THE REVERSE HEREOF ARE INCORPORATED AS THOUGH FULLY REWRITTEN," did not satisfy the above test. The instant ticket's warning compares more favorably to the warning on the *O'Connell* ticket than to those tickets containing warnings which "can reasonably be expected." *Id.* at 851.

O'Connell cites with approval ticket warnings held to be reasonable in *Baron v. Compagnie Generale Transatlantique*, 108 F.2d 21 (2d Cir. 1939); *Gardner v. Greek Line*, 388 F. Supp. 856 (M.D. Pa. 1975); *Lipton v. National Hellenic American Lines*, 294 F. Supp. 308 (E.D.N.Y. (1968); and *Hahn v. Norwegian American Line*, 1973 A.M.C. 794 (N.D. Ill. (1971), *aff'd* 1973 A.M.C. 803 (7th Cir. 1972). The cover warnings on the *Baron* and *Gardner* tickets refer specifically to the "limitations on liability" of the carrier set forth therein. The cover warnings on the *Gardner*, *Lipton* and *Hahn* tickets contained the words "IMPORTANT NOTICE."

By contrast, the instant ticket neither apprises the passenger of "the existence" or "the importance" of the limitations provisions. It merely instructs the passenger that the contract's "terms and conditions" are "set forth inside" and to "please read carefully." Certainly, the carrier has not met its burden of proof of showing that it did "all it reasonably could to warn" Petitioners of the existence and importance of these terms.

Moreover, the Opinion below places great weight upon the fact that "the passenger omitted to read the tickets provisons." *Marek* at 12. The Court's focus upon the passenger's conduct as opposed to the carrier's is also contrary to the intent of *Silvestri* which places the burden of proof on the carrier to do "all it reasonably could" to warn the passenger of the importance and existence of the limitations clauses. *Id. at 17*.

The *O'Connell* court pointed out that regardless of the passenger's conduct, the carrier has a clear duty:

> {The carrier} is attempting to limit the rights of the plaintiff, and it must do so in a manner reasonably calculated to inform the plaintiff of those limitations and their importance. It cannot control what plaintiff does, but it can control what it does. If it provides adequate, notice, it has done all it can be expected to do. Any one of the warnings {cited above}. . . . . would be sufficient, regardless of whether passengers choose to read the contract.

The "all it reasonably could" standard should be strictly applied by this court considering the circumstances surrounding the drafting of this particular ticket's provisions. As will be further discussed below, one such circumstance is that the instant ticket was an adhesion contract.

Another circumstance is that it has been ninety years since the United States Supreme Court in the landmark decision *The Majestic* refused to include "in the contract proper, in terms or by reference", fine print limitations on liability hidden inside the ticket. *The Majestic*, 166 U.S. at 385, 17 S. Ct. at 602. As the United States Court of Appeals for the Second Circuit stated in *Silvestri*, a dozen years ago, "Seventy years of experience under the Majestic Doctrine should have enabled the draftsmen of the

ticket to produce a warning significantly more eye-catching than this." *Id.* at 17-18.

Given these circumstances, the ticket's warning fell short of that which Appellee's had a duty to provide and thus the contractual limitations are unenforceable.

B. The passenger ticket itself and the provisions contained therein constitute an unenforceable adhesion contract.

The United States Supreme Court has recognized that "the carrier and the customer are not on an equal footing." *New York, N.H. and H.R.R. vs. Nathnagle*, 346 U.S. 128, 73 S.Ct. 990, 97 L.Ed. 1500 (1953).

Passenger tickets such as the one at issue in this case are adhesion contracts in which the passenger does not bargain for the terms or conditions contained therein. The passenger merely accepts the ticket before embarkation on a take it or leave it basis. *Shankles vs. Costa Armatori*, 722 F.2d. 861 (1st Cir. 1983).

Nevertheless, this Court has upheld the six month notice and twelve month claim limitation provisions of the instant ticket on the ground that they were reasonably communicated to the passenger. This analysis is contrary to traditional contract law, since it does not take into account the threshold question of whether a contract was ever entered into between carrier and passenger.

It is fundamental that once a contract is deemed to be one of adhesion, its terms must be examined by the court for fairness, in order to determine if they were unreasonably favorable to one party. *Bishop v. Washington*, 331 Pa. Super 387, 480 A.2d 1088 (1984). If the instant ticket is examined in this light, it becomes apparent that the six month notice and twelve month claim limitation provisions violate public policy and should not be enforced.

The ticket at issue was printed on a standard form drafted by the Appellees solely with their interests in mind. Petitioner did not have a meaningful opportunity to negotiate the terms of the ticket or even to read them before "accepting" the ticket.

The ticket and its provisions were imposed on Petitioner on a take it or leave it basis after she had travelled to Florida from Pennsylvania and as she was boarding the vessel.

At the time that this ticket was drafted, the Appellees were certainly aware that the notice and claim limitations provisions contained therein considerably restricted a passenger's legal rights following an accident resulting in injury. Since the passenger did not receive anything in exchange for the inclusion of these clauses, they are patently unfair, unreasonably favorable to the carrier and should not be enforced.

The carrier cannot rely solely on his alleged compliance with 42 U.S.C. Section 1836 to justify that the instant ticket constitutes an enforceable contract. The purpose of that section is to make it unlawful to provide shorter limitation and notice periods than those set forth in the Appellee's ticket. The statute, however, does not authorize the inclusion of these terms in a ticket without the passenger's consent or prior notice. The language of 46 U.S.C. Section 1836 should be read to supplement rather than to supersede the fundamentals of contract law including the doctrines of offer, acceptance, and adhesion contract.

Circuit Justice Frank argues in his dissenting opinion in *Siegelman vs. Cunard White Star*, 221 F.2d 189 (5th Cir. 1955), that the doctrine of adhesion contract should apply equally in the context of passenger line ticket provisions as it does in other areas of contract law. In *Siegelman*, the provision of the carriage contract at issue concerned choice of law. Judge Frank reasoned that the passenger "had no choice in the matter" and "cannot in fairness be said to have joined" in the ticket provision. "Therefore it would seem that the party should not be bound by such a provision." *Id.* at 206.

His conclusion was based upon the premise that:

> In such a standardized or mass production agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of "freedom of contract" cannot be applied rationally. *Id.* at 204.

There is no reason to treat the instant ticket differently than other adhesion contracts, such as insurance contracts. Given the lack of any negotiation or opportunity to read the ticket prior to acceptance, the claims limitation and notice provisions are unreasonable and unfair. Therefore, they should not be enforced by this court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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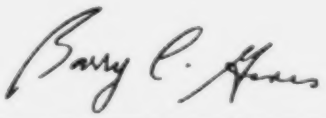
CERTIFICATE OF SERVICE

Barry L. Gross, Esquire, attorney for Appellant's Harriet Marek and Samuel Marek, husband and wife, certifies that he served a copy of this Petition for Writ of Certiorari upon Appellees' attorney, Douglas H. Riblet, Rawle and Henderson, 211 South Broad Street, Philadelphia, Pennsylvania 19107 on 28th of July, 1987, by regular U.S. Mail.



BARRY L. GROSS, ESQUIRE

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1493

MAREK, HARRIET and MAREK, SAMUEL
Husband and Wife,

Appellants

v.

MARPAN TWO, INC.

and

BAHAMA CRUISE LINE, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 84-2214)

Submitted under Third Circuit Rule 12(6)
February 11, 1987

Before: HIGGINBOTHAM and STAPLETON,
Circuit Judges,
and RODRIGUEZ, *District Judge*.*

(Filed May 1, 1987)

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*Hon. Joseph H. Rodriguez, United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal continues the long line of cases, going back at least as far as *The Majestic*, 166 U.S. 375 (1897), involving the enforcement of contractual conditions that are invariably located deep in the fine print of cruise ship tickets. Because the ticket at issue here was reasonably communicative in giving notice of the existence and importance of, and in expressing, its limiting conditions, we will affirm the district court's entry of summary judgment for appellees.

I.

The following facts are taken from appellants' complaint and from the affidavit of appellant Harriet Marek ("Marek"). At some point prior to March 1983, Marek and her friend Jackie Toombs made arrangements through the Warren County Motor Club of Warren, Pennsylvania, for a cruise aboard the S.S. VERACRUZ. Marek and Toombs traveled to Tampa, Florida, prior to the vessel's sailing date of March 12,

1983. They did not receive their cruise ticket folder, however, until they boarded the ship for departure in Tampa, at which time they together were given one ticket folder. In the boarding process, ship personnel removed one sheet of paper from this joint ticket folder. The folder, a cover containing the two remaining pages, was thereafter retained by Toombs. Marek recalls that she and Toombs, sometime after they had boarded ship, "scanned the written material on the inside of the front cover of the ticket folder, but . . . [they] did not read every word that was there because the print was so small and crowded and because [they] couldn't understand most of what was printed there." Marek also recalls that they "glanced at printed material on the outside of the back cover of the ticket folder, although [she] do[es]n't recall what that material said." Marek, at that time and later, neither read nor became aware of the printed material on the ticket's inside back cover. The ticket folder shared by Marek and Toombs includes, as one of its terms and conditions, the following language:

> 6. (a) Neither the Carrier nor the Vessel shall be liable for any claim for loss of life or personal injury, whatsoever and wheresoever arising and howsoever caused, unless written notice thereof, with full particulars be given to the Carrier within six (6) months from the date of such loss of life or injury.
>
> (b) Suit to recover on any such claim against the Carrier or the Vessel shall not be maintainable unless:
>
> > (1) The Passenger has complied with the above notice provisions; and (2) Suit is instituted within one (1) year from the date of the loss of life or bodily injury.

These time limits on the filing of personal injury actions are implicitly authorized by federal statute. 46 App. U.S.C. § 183b(a) (Supp. III 1985).[1] Other physical characteristics of the ticket folder are described below in section III.

On March 18, 1983, while the S.S. VERACRUZ was at sea, Marek slipped while walking down a stairway in the vessel, sustaining a number of severe personal injuries. More than one year later, on May 8, 1984, Marek and her husband, appellant Samuel Marek, filed this diversity action in the Eastern District of Pennsylvania against appellee Marpan Two, Inc., which owned at the relevant times the S.S. VERACRUZ, and appellee Bahama Cruise Line, Inc., which chartered the vessel for this fateful cruise.

The district court granted appellees' summary judgment motion. *Marek v. Marpan Two, Inc.*, No. 84-2214 (E.D. Pa. July 15, 1986). Marek admittedly failed to file this suit within one year of her accident, in clear violation of paragraph 6(b)(2) of her ticket contract, and the district court determined that this

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1. Section 183b(a) provides that

> [i]t shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

46 App. U.S.C. § 183b(a) (Supp. III 1985). It "is a declaration of Congressional policy as to lawful contractual time limitations. . . ." Witte v. Nederlandsch Amerikaansche Stoomvaart Maatschappiaj, 96 F. Supp. 485, 486 (D.N.J. 1951).

particular contract limitation was valid as a matter of law.[2]

II.

We review a grant of summary judgment by applying the same test a district court should employ. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert denied*, 429 U.S. 1038 (1977). A district court may enter summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In cases of this variety, the facts tend to be uncontested. The only issue that remains then is a wholly legal one: Are the time limitations contained in the ticket's fine print part of the passenger's contract with the owners and operators of the cruise vessel?[3]

---

2. Marek also admits that she failed to comply with the six month written notice requirement of ticket paragraph 6(a). Because its validity flows from the identical considerations that validate the contract's one-year filing requirement for personal injury suits, we read the district court's opinion as implicitly approving both provisions.

3. In this appeal, however, Marek also claims that contested issues of material fact preclude summary judgment against her. These arguments, which concern Marek's actual awareness of the ticket's time limitation provisions and her actual opportunity to acquire such awareness, merely rehash the legal issue we address below: "whether the contractual limitation on the time for filing suit was reasonably communicated to [Marek] so that the [appellees] may rely on it." Strauss *ex rel.* Strauss v. Norwegian Caribbean Lines, Inc., 613 F. Supp. 5, 8 (E.D. Pa. 1984); *see also* Shannon v. Norwegian Caribbean Lines, 640 F. Supp. 373, 374 & n.1 (M.D. Pa. 1985) (where plaintiffs admit that they had their travel documents and tickets from a few days before their voyage until some time after they boarded ship, "no issue of material fact exists as to the question whether plaintiffs had an opportunity to read the provisions of the contract of passage but nonetheless simply failed to do so").

Courts thus consider it "well-established" that evaluating time limits on notice and filing of a passenger's lawsuit "constitutes a legal determination, suitable for disposition by summary judgment." *DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5, 11 (1st Cir. 1981); *accord Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 218 (6th Cir. 1983). This determination, in turn, is best understood as a pair of distinct legal examinations. One focal point is the adequacy of so-called "warning language," often found on the front cover of a cruise ticket, directing a passenger to read the particular terms inside the ticket. The other focal point is the ticket terms themselves, and concerns such physical characteristics as the location of the terms within the ticket, the size of the typeface in which they are printed, and the simplicity of the language they employ. The question is thus whether, "taken together, the various notices and provisions of this cruise ticket contract" suffice legally to give effect to the time limits it contains. *Lubick v. Travel Servs., Inc.*, 573 F. Supp. 904, 907 (D.V.I. 1983). Because this is a matter of first impression in our Circuit, we begin our legal analysis by briefly summarizing and adopting the general approach that other courts have taken to this legal question.

The seminal opinion in this field, as in so many others, is one authored by Judge Henry Friendly. In *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968), Judge Friendly concluded that "the thread that runs implicitly through the cases sustaining [such cruise ticket time limitations] is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his [or her] legal rights." *Id.* at 17. As the district court recognized, however, this statement of the legal test, if taken literally, is simply too rigid. There is no

> situation where, from hindsight, one could not imagine the shipowner doing some little bit more to draw attention to the limitation clause. . . . Thus, even though the courts continue to use the "all it reasonably could" language, application of the standard involves notions of reasonableness and not hypothesizing some further step the shipowner could possibly have taken.;

Marek, No. 84-2214, mem. op. at 3 (E.D. Pa. July 15, 1986). We therefore follow in the wake of those courts, including those in our Circuit,[4] that have adopted the more practical "standard of reasonable communicativeness,"[5] *Lipton v. National Hellenic Am. Lines*, 294 F. Supp. 308, 311 (E.D.N.Y. 1968), and we apply that standard as we assess Marek's particular contentions.

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4. *See, e.g., Shannon*, 640 F. Supp. at 374 ("reasonably communicat[ing] to the plaintiffs the terms of the contract limiting the time for filing suit . . . satisf[ies] the *Silvestri* standard"); Valenti v. Home Lines Cruises, Inc., 614 F. Supp. 1, 4 (D.N.J. 1984) ("The passage contract should 'reasonably communicate' to the passenger that the condition limiting liability is an important matter.") (citations omitted); *Strauss ex rel. Strauss*, 613 F. Supp. at 7 ("Numerous cases have discussed the 'reasonable communicativeness' standard [that is to be] applied to . . . limitations in contracts of maritime passage . . . ."); Gardner v. Greek Line, 388 F. Supp. 856, 857 (M.D. Pa. 1975) (the contract's paragraphs "are, if read, reasonably comprehensible").

5. *See, e.g., Barbachym*, 713 F.2d at 219 ("adopt[ing] the 'reasonable notice' standard of *Silvestri*"); *DeNicola*, 642 F.2d at 10 ("the recent[,] . . . more sensitive inquiry into the 'communicativeness' of all warnings of the ticket conditions is a welcome development"); McQuillan v. "Italia" Societa Per Azione Di Navigazione, 386 F. Supp. 462, 466 (S.D.N.Y. 1974) ("this passage contract reasonably communicates the importance of the terms and conditions to the passenger and therefore they are incorporated into the contract"), *aff'd*, 516 F.2d 896 (2d Cir. 1975).

III.

A.

Across the top of the ticket folder cover, beneath the words "S.S. VERACRUZ" and above an impressive picture of the vessel and the words "BAHAMA CRUISE LINE," appears the following warning: "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT. THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH INSIDE. PLEASE READ CAREFULLY." The warning, which is printed in capital letters that are approximately 1/16 inch high, is clearly printed and easily read, even when held at arms' length distance from the naked eye.[6] Across the top of the first of two columns of print on the first page inside the folder appears this additional warning:

CONDITIONS OF CONTRACT
Acceptance Of This Ticket By The Passenger Shall Constitute An Acceptance By The Passenger, As That Word Has Been Defined, Of All The Terms And Conditions Set Forth Herein.

This warning, in letters approximately 1/8 inch high, is also clearly printed, and its relatively larger print size makes it even easier to read than the warning on the folder's front cover. A third warning, at the bottom of the passenger copy of the ticket itself, states: "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT READ TERMS AND CONDITIONS CAREFULLY." This warning, in letters slightly less than 1/16 inch high, is also clearly printed and easily read. Marek nonetheless contends that these warnings

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6. Although it is not possible to identify original colors from the black and white photocopy of the ticket that appears in the record before us, *see* Brief for Appellants at 55a-60a, we have no reason to doubt that the cover warning is printed in dark brown ink on a light brown background. *See id.* at 17.

-- especially the one on the folder's front cover -- did not reasonably communicate the existence and importance of the terms inside, including the time limits in ticket paragraph six. We disagree.

Marek's first allegation, that the cover warning should have been "significantly more eye-catching than this," *Silvestri*, 388 F.2d at 18, asks too much of appellees. Each of the three warnings is easy to read and appears at a prominent place in the ticket folder. Taken together, they indicate that appellees did what was reasonable to communicate to Marek and Toombs that the terms of the contract exist, are important, bind them as passengers, and should be read. We also note, as did the district court, that the warnings in this folder compare favorably with ticket notices that courts have approved,[7] and they far surpass in clarity and visibility those notices that courts have found inadequate.[8]

Marek's second allegation -- that the warnings are inadequate because they do not mention paragraph six explicitly, stress the importance of contractual time limits, or indicate that passengers' legal rights may be affected by the ticket's terms and conditions -- also seeks more than reasonable communicativeness entails. "[C]ases in which the carrier's liability limitations have been honored generally involve tickets with conspicuous warnings directing the passenger's attention to the contractual terms contained elsewhere," *Barbachym*, 713 F.2d at 220, but no case stands for the proposition that a warning is legally insufficient unless it includes explicit references

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7. *See, e.g., DeNicola*, 642 F.2d at 10-11; *Lubick*, 573 F. Supp. at 906-07; *McQuillan*, 386 F. Supp. 465-66.

8. *See, e.g., The Majestic*, 166 U.S. at 379; *Silvestri*, 388 F.2d at 14; O'Connell v. Norwegian Caribbean Lines, Inc., 639 F. Supp. 846, 848-49, 852 (N.D. Ill. 1986).

naming each of the contractual terms or conditions having the potential to affect the legal rights of passengers. It is sufficient that this ticket contains three conspicuous warnings directing a passenger's attention to the terms and conditions inside the folder.

B.

Marek next attacks the validity of paragraph six itself, which contains the contractual time limits that she has admittedly failed to meet in bringing this suit. Her first claim, that paragraph six is printed in typeface too small to read, lacks merit. Although the print is small, we have no trouble reading it, and the paragraph is certainly not "so muddled or illegible as to be unenforceable." *Gardner*, 388 F. Supp. at 858; *cf. Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 243 (S.D.N.Y.) ("The footnotes printed in microscopic type . . . as well as [a] condition . . . camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . . are both unnoticeable and unreadable. Indeed, they are virtually invisible."), *aff'd*, 370 F. 2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968) (per curiam). In addition,

> [a]lthough a passenger may almost never read all of the fine print on the ticket upon purchase, or as pleasure reading in the berth the first night at sea, the same passenger might very well be expected to consult the multifarious terms and conditions of the ticket/contract in the event of an accident resulting in a loss or injury.

Shankles, 722 F.2d at 865. As a court once noted in a similar case, "the type-size in which [the time limitations] clause is printed is not the significant matter; there is both ample time and a powerful

incentive to study the passage contract ticket promptly after a loss has occurred," *Lipton*, 294 F. Supp. at 311, and Marek cannot blame others -- the ship owner, the company that chartered the ship for this cruise, or even the anonymous printer or type-setter who "made" this folder and its paragraph six -- for her failure to read it within six months of her accident.

Marek also argues that the placement of paragraph six -- a low-numbered provision located at the lower left-hand corner of the ticket folder's inside back cover -- effectively hid it from her view. Although the physical placement of a contractual condition is a factor to take into account, *see, e.g., Barbachym*, 713 F.2d at 220 (noting that "the article on the limitation of liability . . . is the thirtieth of thirty-five"), it is not dispositive here. Paragraph six is not harder to find or to read than any of the other provisions in this contract, and, once it is located and read, it is easily understood. There is also no requirement that a time limitation provision must be the first clause of such a ticket contract before it is legally enforceable.

Marek's final, related, argument is that paragraph six is unenforceable because it was concealed by a sheet of carbon paper in the ticket folder. Like the district court, we find this claim particularly "hard to believe." *Marek*, No. 84-2214, mem. op. at 8 (E.D. Pa. July 15, 1986). The carbon paper is merely one page in the ticket folder, and its presence does not nullify the ticket's warnings or destroy the reasonableness of paragraph six. In addition, as we have already noted, "[a]fter a disaster . . . it would seem entirely natural that any passenger suffering a loss or damage would" lift the carbon paper in the process of closely examining the ticket's provisions. *Shankles*, 722 F.2d at 867.

C.

Marek's final distinct argument derives from the fact that she and Toombs shared one ticket folder. This fact has no independent legal significance. No evidence suggests that Toombs denied Marek access to the ticket at any time. Indeed, Marek's affidavit makes clear that each woman at least glanced at the folder after boarding ship. We also note that Toombs's possession of the folder is sufficient to charge Marek with notice of its provisions. *See DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 (S.D.N.Y. 1976); *Rogers v. Furness, Withy & Co.*, 103 F. Supp. 314, 316-17 (W.D.N.Y. 1951).

IV.

Judge Cardozo noted long ago that "[t]he passenger who omits to read takes the risk of the omission." *Murray v. Cunard S.S. Co., Ltd.*, 235 N.Y. 162, 139 N.E. 226, 228 (1923). For the foregoing reasons, the district court's entry of summary judgment for appellees will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1493

MAREK, HARRIET and MAREK, SAMUEL
Husband and Wife,
Appellants

v.

MARPAN TWO, INC.

and

BAHAMA CRUISE LINE, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 84-2214)

Submitted under Third Circuit Rule 12(6)
February 11, 1987

Before: HIGGINBOTHAM and STAPLETON,
Circuit Judges,
and RODRIGUEZ, District Judge.*

(Filed May 1, 1987)

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*Hon. Joseph H Rodriguez, United States District Court for the District of New Jersey, sitting by designation.

ORDER AMENDING OPINION

It is ORDERED that the slip opinion of this Court filed May 1, 1987, be amended as follows:

(1) On page 3, line 19, the new sentence marks the start of a new paragraph.

(2) On page 5, line 4 of Section II, the word "*cert*" be followed by a period (.).

(3) On page 5, line 8 of Section II, the words "Fed. R. Civ. P." be printed in bold typeface, "**Fed. R. Civ. P.**"

(4) On page 7, at the end of the indented quotation, delete the semicolon (;).

(5) On page 8, delete the last three lines of the indented quotation. Replace them with this language, in three lines exactly as follows:

Constitute An Acceptance By The Passenger,
As That Word Has Been Defined,
Of All The Terms And Conditions Set Forth Herein.

BY THE COURT:

A. Leon Higginbotham, Jr.

Circuit Judge

May 11, 1987

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 86-1493

MAREK, HARRIET and MAREK, SAMUEL
Husband and Wife,

Appellants

vs.

MARPAN TWO, INC.
and
BAHAMA CRUISE LINE, INC.

(D.C. Civil 84-2214)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HIGGINBOTHAM, and STAPLETON, *Circuit Judges* and RODRIGUEZ, *District Judge**

---

* Hon. Joseph H. Rodriguez, United States District Judge, for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6), February 11, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 15, 1986 be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

CLERK

May 1, 1987

Certified as a true copy and issued in lieu
of a formal mandate on June 1, 1987

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRIET MAREK AND SAMUEL MAREK, Husband and Wife	:	CIVIL ACTION
v.	:	FILED JULY 15, 1986
MARPAN TWO, INC.	:	
	:	NO. 84-2214
AND	:	
BAHAMA CRUISE LINE, INC.	:	

MEMORANDUM AND ORDER

SCIRICA, J. July 15, 1986

Plaintiffs' complaint alleges that plaintiff-wife was injured while a passenger on defendant's cruise ship, the SS Vera Cruz. The complaint alleges that plaintiff-wife sustained her injuries on March 18, 1983 while the vessel was at sea. Plaintiffs instituted their personal injury action in this court on May 8, 1984. The defendants have moved for summary judgment asserting that plaintiff's complaint was filed out of time, as the contract of passage provides that such suits must be brought within one year of the date of injury. At issue is the validity of the defendants' contract limitation.

The issue before the court is not one of first impression. The federal courts have wrestled with this precise problem since at least 1987, with the Supreme Court's decision in *The Majestic*, 166 U.S. 375 (1897). Those early cases dealt primarily with the question whether, because of their location, attempted liability limiting provisions had actually been incorporated in the contract of passage. However, today, incorporation is generally conceded and the focus has shifted to the reasonableness of the limitation clause. That is to say, whether the contract reasonably alerts passengers to the importance of the clauses.

Congress has specifically allowed for the contractual limiting of the period for giving notice of and filing a claim for personal injuries 46 U.S.C. §183(b). Section 183(b) makes it unlawful for a shipowner to limit such period for giving notice to less than six (6) months and for limiting the time to file suit to less than one year. Thus, contractual limitations for a period in excess of those deemed unlawful have been implicitly authorized by statute. The courts have universally recognized the ability of shipowners to so limit the time for filing suit, provided of course, the owner does so properly. Plaintiff's argument that 46 U.S.C. §763(a) supersedes or controls 46 U.S.C. §183(b) is without merit. By its own terms, §763(a) provides that "[u]nless otherwise specified by law, suits for personal injury cannot be commenced unless filed within three (3) years." Section 183(b), which allows contractual limitation, is such other law. If the ship owner chose not to limit the period the outside filing date would be three (3) years. *See also Catterson v. Paquet Cruises, Inc.* 515 F.Supp. 645 (S.D.N.Y. 1981).

A review of the myriad of cases addressing the issue reveals that, as is often the case in the law, there is no bright line test available. The modern case law starts with the seminal decision in *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2nd Circuit 1968). In *Silvestri*, Judge Friendly set forth the accepted standard for deciding whether an attempted contractual limitation is valid. In striking down such an attempt Judge Friendly opined, "[h]owever, the thread that runs implicitly through the cases sustaining incorporation is that the steamship line had done all it *reasonably* could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." *Id.* at 17. (emphasis added)

The "reasonableness" standard has subsequently been applied to both uphold and strike down attempts to contractually limit the time for filing suit. Those cases upholding the limitation as giving reasonable notice include: *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard*, 642 F.2d 5 (1st Cir. 1981); *Lubick v. Travel Services, Inc.*, 573 F.Supp. 904 (D.C.V.I. 1983); *DeCarlo v. Italian Line*, 416 F.Supp. 1136 (S.D.N.Y. 1976); *McQuillian v. Italia Societa*

Per Azioni Di Navigazione, 386 F.Supp. 462 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 896 (2nd Cir. 1975); *Lipton v. National Hellenic American Lines*, 294 F.Supp. 308 (E.D.N.Y. 1968). Those cases holding that there was at least an issue of fact as to the reasonableness include, in addition to *Silvestri*: *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); *Coda v. Costa Line, Inc.*, 547 F.Supp. 85 (N.D. Ill. 1982).

While the standard enunciated in *Silvestri* involved the ship owners doing "all it reasonably could" to alert passengers to the limitation clauses, the test has not been so rigidly applied. Indeed, taken at its word, one could hardly envision a situation where, from hindsight, one could not imagine the shipowner doing some little bit more to draw attention to the limitation clause. For example, the print could always be bigger, bolder, or a different color. The limitation clause could be placed in a more noticeable location or could even be more specific. Thus, even though the courts continue to use the "all it reasonably could" language, application of the standard involves notices of reasonableness and not hypothesizing some further step the shipowner could possibly have taken.

The case-by-case application of the "reasonableness" of the notice naturally has entailed discussion of the contract of passage in detail. The size of the type used for the limitation clause, its color, location, etc. have all been analyzed. Further, courts have consistently gone beyond the tickets themselves to consider all of the surrounding circumstances, including where the ticket was received, that the passenger retained it years after the cruise and that there is powerful incentive to study such clauses after an injury has occurred. *DeNicola* at 11.

According to affidavit, plaintiff-wife, Mrs. Harriet Marek, and an acquaintance, Mrs. Jackie Toombs, made arrangements for a cruise aboard the SS Vera Cruz through the Warren County Motor Club, Warren, Pa. The ship set sail from Tampa, Florida on March 12, 1983. Plaintiff-wife and Mrs. Toombs received a single ticket for both of them when they boarded the vessel. Plaintiff-wife and Mrs. Toombs were given a single ticket folder that contained a single ticket or contract for both of them. Upon boarding the vessel the original ticket was removed

leaving plaintiff-wife and Mrs. Toombs with the ticket folder containing a sheet of carbon paper and a carbon copy of the detached ticket issued in both their names. Plaintiff-wife claims that she and Mrs. Toombs "scanned the written material on the inside front cover" and "glanced at printed material on the outside of the back cover," but that she did not "read any printed material. . . .on the inside of the back cover" nor was she aware that there was anything printed therein.

Observation of a photocopy of the actual ticket folder issued to plaintiff-wife and Mrs. Toombs revealed that the folder is 8½" x 4". Inside the folder is a piece of carbon paper and a carbon copy of the ticket issued to plaintiff-wife and her friend. The folder is light brown with dark brown print. The outside cover of the folder is dominated by a picture of the SS Vera Cruz. Underneath the ship's picture in 7/16" print are the words "Bahama Cruise Line." At the top of the front cover and centered, also in 7/16" print, is the ship's name "SS VERA-CRUZ." The only other print on the front cover is the following: "Acceptance of this ticket constitutes a contract, the terms and conditions of which are set forth inside. Please read carefully." These two sentences span the length of the folder cover in approximately 3/16" bold print immediately below the ship's name and above the ship's picture.

The inside front cover contains, in bold face type approximately 3/16", the following:

Conditions of Contract
Acceptance of this ticket by the passenger shall
constitute an acceptance by the passenger,
as that word has been defined,
of all the terms and conditions set forth herein.

Directly beneath the above, in small but readable type, are paragraphs 1(a) and (b); 2(a) and (b); 3(a), (c) and (d); and 4.

Inside the folder next to the inside front cover is a sheet of carbon paper. Next to the carbon paper is the passenger's carbon copy of the ticket or contract of passage. The passenger copy of the "passage contract ticket" contains the names of Mrs. Marek and Mrs. Toombs and other relevant information regarding their

cruise. In addition, at the bottom of the ticket appears the following: "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT READ TERMS AND CONDITIONS CAREFULLY."

Next to the passenger copy of the ticket is the inside back cover of the ticket folder. It contains clauses 5(a), (b) and (c); 6(a), (b), (c), (d) and (e); and 7(a), (b), (c), and (d). The outside back cover contains the remainder of 7(d) plus 7(e) (f), (g), (h), (i), (j) and (k); 8(a), (b) and (c); 9; 10; and 11. The limitation clause at issue is contained on the inside back cover in clauses 6(a) and (b) and they read:

> Neither the Carrier nor the Vessel shall be liable for any claim for loss of life or personal injury, whatsoever or wheresoever arising and howsoever caused, unless written notice thereof, with full particulars, be given to the Carrier within six (6) months from the date of such loss of life or injury.
>
> Suit to recover on any such claim against the Carrier or the Vessel shall not be maintainable unless:
>
> (1) The Passenger has complied with the above notice provisions; and
>
> (2) Suit is instituted within one (1) year from the date of the loss of life or bodily injury.

Plaintiffs object to the defendants' motion for summary judgment contending that the attempted contractual limitation did not reasonably alert plaintiff-wife to its importance. Specifically, plaintiffs argue that the notices alerting the passenger to read the clauses were inadequate, that the limitation was buried in clause number six rather than appearing first, that it does not stand out in any way from the other clauses, that the attempted limitation on the inside back cover was hidden by the carbon paper, that plaintiff-wife did not receive the ticket until boarding, and that only a single ticket folder was issued to her and Mrs. Toombs. I will address each of these arguments individually.

Plaintiffs first argue that the notices were inadequate. This raises "a question of law to be determined by the court." *Shankles* at 687. An inspection of the ticket reveals that there is a warning on the front cover which alerts the passenger to read the ticket carefully. The warning is in bold capital letters. There is nothing obscure about the location of this warning, nor is it difficult to read. The inside front cover contains another warning in bold type which is even larger than the previous warning. This warning communicates to the passenger that the ticket is a contract and that acceptance of the ticket by the passenger is an acceptance of all the terms set forth in the ticket. This warning is also easy to read and quite visible. Finally, there is the third warning at the bottom of the passengers carbon copy of the ticket and it too compares favorably with the other two warnings. These three warnings taken together lead me to conclude that the defendant has done all that is reasonable to communicate to the plaintiffs that the terms of the contract are important and that they should read them. The warnings found in this ticket compare favorably with others which have been found to be adequate. *DeNicola, supra; Lubick, supra; Lipton supra; Compare Silvestri, supra,* with *McQuillan, supra* (ticket format inadequate in *Silvestri;* same cruise line's revised ticket held adequate in *McQuillan*). For these reasons I dismiss plaintiffs' first argument.

Plaintiffs' second argument is that the time limitation clause was buried in clause six, rather than appearing first, and therefore difficult to discover. While it is true that clause six is not bigger or bolder than any of the other clauses in the contract, it is also not smaller or fainter than any of the other clauses contained therein. The fact is that clause six is present and easily understandable. Such clauses need not be the first clause of the contract as plaintiffs suggest. *See Lubick, supra,* (limitation clause was 16th out of 19); *Gardner v. Greek Line,* 388 F.Supp 856 (M.D. Pa. 1975) (limitation clause was 32nd out of 34); *McQuillian, supra,* (limitation clause was 16th out of 16). Likewise, plaintiffs' third argument, that the print of the clause is too small is also meritless. While an inspection of the print reveals that the type is small, it is certainly not so small that it is

illegible and it certainly does not come close to the dicta of the *Gardner* court as being "virtually incomprehensible." In fact, the court in *Lipton* noted that,

> [t]he time limitation clause, however, does not become relevant until after the loss or injury occurs and inquiry is afoot. In view of the function of the clause, *the type-size in which it is printed is not the significant matter*; there is both ample time and powerful incentive to study the passage contract ticket promptly after a loss has occurred. (emphasis added)

Id. at 311.

Plaintiffs' fourth argument alleging that the limitation clause was hidden by carbon paper is also without merit. It is hard to believe that one would conclude that there is nothing of importance left to read in the folder merely because one came to a page of carbon paper as they were leafing through the folder. All one would have to do is simply lift the carbon paper as if it were just another page of type to see that the contract provisions continue on another page. Also plaintiff-wife admits having "scanned" the inside front cover of the ticket folder along with the outside back cover. Even a cursory examination would have alerted plaintiff-wife of the fact that the paragraph numbers jumped from 4 to 7(d). This alone should have led her to realize that she was either missing part of the contract or that there were more provisions inside the folder.

Plaintiffs' fifth argument that plaintiff-wife did not receive the ticket until boarding is also unsupported by case law. As was previously quoted from *Lipton supra*, "there is both ample time and powerful incentive to study the passage contract ticket after a loss has occurred." In addition, plaintiff-wife admits to having scanned the ticket but says that she didn't read the printed material. A minimal inspection of the ticket would have revealed the warnings to read the terms of the contract. If plaintiff-wife then declines to read the terms, she takes the risk of the omission. *Murray v. Cunard, S.S. Co.*, 235 N.Y. 162, 166, 139 N.E. 226, 228 (1923).

Plaintiffs' final argument is that plaintiff-wife was not given her own ticket but rather shared one with Mrs. Toombs. Again, this argument is meritless since there are no facts pleaded to suggest that Mrs. Toombs denied plaintiff-wife access to the ticket. Plaintiff-wife doesn't assert that she asked to read the ticket and was denied the right to do so by Mrs. Toombs. In fact, as was previously noted, plaintiff-wife admits that she and Mrs. Toombs scanned the ticket after boarding the vessel. This leads me to conclude that plaintiff-wife had control over the ticket and that her decision not to read the terms of the passage contract was a voluntary one.

I therefore conclude that the ticket in the instant case compares favorably with the descriptions of tickets in other cases and that this ticket meets the standard of reasonableness set forth in *Silvestri*. I will therefore grant the defendants' motion for summary judgment since the plaintiffs have failed to file this action within the one (1) year limitations period provided for in the passage contract ticket.

_____

Anthony J. Scirica, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRIET MAREK and SAMUEL MAREK	:	CIVIL ACTION
vs.	:	
MARPAN TWO, INC.	:	
and	:	NO. 84-2214
BAHAMA CRUISE LINE, INC.	:	

ORDER

AND NOW, this 15th day of July, 1986, upon consideration of defendants' motion for summary judgment, and plaintiffs' response thereto, it it hereby ORDERED that defendants' motion is GRANTED and plaintiffs' complaint is DISMISSED with prejudice.

_____

Anthony J. Scirica, J.

S/S VERACRUZ
ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT, THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH INSIDE. PLEASE READ CAREFULLY
BAHAMA CRUISE LINE

Bahama Cruise Line, Inc.
Registered in Panama

PASSAGE CONTRACT TICKET No. 29234

FROM	TO	CAT.	CABIN	SAILING DATE
Tampa	Tampa	GTE	A21	Mar 12 1983

NAME OF PASSENGER	AGE	NATIONALITY	FARES
Marek Mrs H	AD		565.00
Toombs Mrs J	AD		565.00

TOTAL SHIP 1130.00

MISC.

GROSS 1130.00

TAXES 40.00

Bahama Crise Line
Tampa Fl

Warren County Motor Club
Warren P A

ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT
READ TERMS AND CONDITIONS CAREFULLY

COUPON E - PASSENGER COPY

A-27

CONDITIONS OF CONTRACT
Acceptance Of This Ticket By The Passenger Shall Constitute An Acceptance by The Passenger, As That Word Has Been Defined, Of All The Terms And Conditions Set Forth Herein.

The following are the terms and conditions of the contract entered into by and between the Passenger, on the one hand, and the Carrier and Vessel, on the other:

1. (a) The word "Passenger" includes all persons traveling under this ticket, their heirs and representatives. The word "Carrier" includes MARPAN TWO INC., the owner of the subject Vessel, and BAHAMA CRUISE LINE, INC., its charterers, their agents, servants, and employees; the masters and crews of the Vessel, and the successors in interest and underwriters of all of the foregoing. The word "Vessel" includes the SS VERACRUZ and any other vessel, whether or not owned or operated by Carrier, used for or assisting in the carriage of the Passenger under this ticket.

(b) As respects any minor Passenger, the terms and conditions of this contract shall be deemed to be binding upon the parents or guardians of such minor Passenger. As respects any Passenger for whom a guardian or trustee has been appointed, the terms and conditions of this contract shall be binding upon such guardian or trustee.

2. (a) This contract is not transferable.

(b) Cancellations are accepted without charge when accommodations are cancelled in writing up to 30 days before sailing date. Cancellations received within 30 to 14 days prior to sailing will be charged $100. per person cancellation fee. Within 14 days of sailing, the right is reserved to assess 50% of the cruise fare, and the full fare is charged for not appearing at the time of sailing without prior notice.

3. (a) If, in the opinion of the Carrier, the performance of the proposed voyage is likely to be hindered or prevented

by war, hostilities, blockade, ice, labor conflicts, strikes on board or ashore, restraint of rulers or princes, breakdown of the Vessel, congestion, docking difficulties, bad weather or seas, or any other cause whatsoever, or if the Carrier considers that for any reason whatsoever proceeding to, attempting to enter, or entering or remaining at the port of Passenger's destination may expose Vessel to loss or damage or be likely to delay the Vessel, then the Passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call, whereupon the responsibility of the Carrier and the vessel shall cease and this contract shall be deemed to have been fully performed, if the Passenger has not embarked, the Carrier and the Vessel may cancel the proposed voyage without liability to the Passenger for such cancellation except for the refund of the fare actually paid. In the event that the Carrier or the master at his own discretion, chooses to offer to the Passenger continuing transportation from any such place of landing, such offer shall be considered a courtesy to the Passenger, and neither the Vessel nor the Carrier shall be responsible for any act of omission or commission or any continuing carrier.

(b) The Vessel shall be entitled to leave and enter ports without pilots or tugs, to tow and assist other vessels in any circumstances, to return to or enter any port at the master's discretion and for any purpose; to delay any sailing; to add, delete, or substitute any ports of call; to deviate in any direction or for any purpose from the direct or usual course; and to substitute any vessel for all or part of the voyage. All such actions or changes shall be considered as forming part of and included in the proposed Voyage.

(c) Neither the Carrier nor the vessel shall in any event be liable for any delay in the commencement of completion of the subject Voyage.

(d) Notwithstanding any other provisions of this contract, neither the Carrier nor the Vessel shall have any

responsibility for any acts or omissions occurring when the Passenger is not on board the Vessel, including, without limitation, any acts or omissions relating to or arising out of any shore excursions undertaken by the Passenger. In making any arrangements and/or issuing any tickets, coupons, and/or vouchers for travel, transfers, sightseeing, vists to museums and the like, or for hotel accommodation and/or meals, the Carrier and the Vessel are acting only as agents, upon the express condition that they shall not be liable for any injury, damage, loss, accident, delay or irregularity which may be occasioned either by reason of any defect in any vehicle or aircraft, or through the action or default of any company or person engaging in transporting the Passenger or in providing any services, goods, or accommodations.

4. The Carrier and the Vessel shall have liberty to comply with any orders, recommendations, or directions given by the government of any nation or by any department or agency thereof or by any person acting or purporting to act with the authority of any such government, department, or agency, or by any committee or person giving or purporting to give such orders, recommendations, or directions on behalf of any underwriters of the Vessel; and any act of commission or omission done in compliance with any such orders, recommendations, or directions, including without limitation the disembarkation of any Passenger or discharge of his baggage, shall not be deemed a deviation or a breach of this contract.

5. (a) Any Passenger who in the judgment of the Carrier (i) appears to be unfit to travel by reason of mental or physical infirmity or for any other reason, or (ii) appears likely to endanger or impair the safety, health, or comfort of persons on board, or (iii) appears likely to be refused permission to land at the port of destination or at any intermediate ports, may, at the discretion of the Carrier, be refused permission to embark or disembark at any port, or be disembarked at any port, or be transferred to another cabin or berth, or be

confined to a cabin or to the ship's hospital, and neither the Carrier nor the Vessel shall thereby be liable to such Passenger for any damage, loss, or expense occasioned to such Passenger, nor for any refund of any monies paid by or on behalf of such Passenger.

(b) If for any reason whatsoever a Passenger is refused permission to land at the port of disembarkation or at any port or place at which the Vessel may call, such Passenger and his baggage may be landed at any port or place at which the Vessel may subsequently call or may be carried back to the port of embarkation; in the latter case, the Passenger shall pay to the Carrier the full fare for the return voyage, in accordance with the Carrier's tariff then in effect, and such return voyage shall be otherwise governed fully by the terms and conditions set forth in this contract.

(c) The Carrier may at any time (including prior to the commencement of the voyage), in its own discretion, transfer any Passenger from one berth or cabin to another, any applicable adjustment in the fare shall thereupon become payable to or due from the Passenger.

6. (a) Neither the Carrier nor the Vessel shall be liable for any claim for loss of life or personal injury, whatsoever and wheresoever arising and howsoever caused, unless written notice thereof, with full particulars, be given to the Carrier within six (6) months from the date of such loss of life or injury.

(b) Suit to recover on any such claim against the Carrier or the Vessel shall not be maintainable unless:

(1) The Passenger has complied with the above notice provisions; and

(2) Suit is instituted within one (1) year from the date of the loss of life or bodily injury.

(c) In any event, the liability of the Carrier and the Vessel shall be limited to a total amount of not more than U.S. $5,000.00 damages in connection with any claim for

loss of life or bodily injury for which the Carrier or the Vessel may be found liable.

(d) Notwithstanding any other provisions of this contract, the Carrier and Vessel shall in no event be liable for any claim of loss of life or personal injury caused in whole or in part by any other passenger or person on board the Vessel or for any such claim occurring while the Passenger is not on board the Vessel; nor for any such claim caused in whole or in part by acts of God, perils and accidents of the sea, errors of navigation, collisions, stranding, fire, explosion, breakdowns or accidents to or from any piece of machinery or equipment, or unseaworthiness of the Vessel.

(e) In the event of the death of a Passenger, the body will be transported to his country or state at the expense of his estate, in consultation with accompanying relative, or next of kin.

7. (a) Each Passenger shall be allowed to bring abroad the Vessel a maximum of 20 cubic feet or 75 pounds of baggage free of charge, except that minor Passengers paying a reduced fare shall be allowed a maximum amount of baggage proportionate to the fare paid for such minor Passenger. The Carrier may, at its sole discretion, refuse to carry any excess baggage or limit the amount thereof. Carrier shall have the right to search the baggage and goods of the Passenger, and Passenger agrees to allow such searches when the Carrier, in its sole discretion, deems them necessary or advisable.

(b) Neither the Carrier nor the Vessel shall be liable for loss of or damage to property in excess of U.S. $300 unless the Passenger, before boarding the Vessel, notifies the Carrier in writing that property having a value in excess of U.S. $300 will be brought abroad the Vessel and unless the Passenger has paid an additional fare equal to one (1%) percent of the amount by which the declared value of the

property exceeds the sum of U.S. $300. The notice required by this subparagraph shall contain a detailed description of the subject property and an itemized declaration of its value, but such declaration shall not be binding on the Carrier or the Vessel.

(c) The limit of liability of the Carrier and the Vessel for loss of or damage to property shall be computed as follows: in the case of loss of property, the least of (i) its invoice cost, (ii) its fair market value at the time and place of its loss, or (iii) its replacement cost; and in case of damage, the least of (i) the cost of repair, (ii) the difference between its fair market value prior to and subsequent to damage, and (iii) its replacement cost; provided, however, that notwithstanding any of the foregoing, the Carrier and the Vessel shall in no event be liable for loss or damage to property in an amount in excess of U.S. $300.00 or such higher valuation as the Passenger may have declared pursuant to paragraph 8(b), above.

(d) No Passenger shall be allowed to bring on board the Vessel weapons, firearms, ammunition, explosives, or other dangerous goods without the prior written authorization of the Carrier. Any such articles or goods brought on board without such prior written permission shall be subject to confiscation by the Carrier. The bringing on board of any drugs, narcotics, or any materials deemed unlawful by the authorities at any place at which the Vessel may call shall be strictly prohibited, and all such drugs, narcotics, and materials shall be subject to confiscation by the Carrier. Should the failure of any Passenger to comply with these provisions result in the imposition of any fine or penalty on the Carrier or Vessel, the Passenger shall indemnify the Carrier or the Vessel for all such fines or penalties, plus the costs and attorney's fees incurred by the Carrier or the Vessel in connection therewith.

(e) No Passenger shall be allowed to have animals or birds on the Vessel, except pursuant to special arrangements made with the Carrier in advance.

(f) The failure of the Passenger strictly to comply with the provisions of this paragraph shall relieve the Carrier and the Vessel of any liability for loss of or damage to property and shall render the Passenger liable for the payment of any port charges, fines, or penalties which the Carrier or the Vessel may incur as a result of such failure.

(g) The provisions set forth in this paragraph shall apply to any and all property of the Passenger, including property taken on board subsequent to the commencement of the voyage.

(h) In no event shall the Carrier or the Vessel be liable for any claim for loss or damage to property unless written notice thereof, with full particulars, be given to the Carrier within fifteen (15) days from the date of such loss or damage; provided that such notice shall in no event be deemed timely if it is given more than fifteen (15) days from the date of landing or abandonment or breaking up of the subject voyage. Suit to recover on any such claim shall in no event be maintainable unless it is instituted within one (1) year from the date of loss or damage, or within one (1) year from the date of landing or abandonment or breaking up of the subject voyage, whichever comes first.

(i) In no event shall the Carrier or the Vessel be liable as carrier, innkeeper, bailee, warehouseman, or in any other capacity, for any loss of or damage to money, jewelry, precious stones, securities, or any other valuables of a Passenger, unless: (i) the above notice and valuation provisions have been complied with by Passenger, (ii) the subject valuables have been deposited with the Purser for safekeeping and a receipt therefor has been obtained from the Purser, and (iii) the loss or damage was caused by the negligence of the Carrier.

(j) The Passenger shall not be liable for nor entitled to any general average contribution in respect to baggage or property taken with him on the Vessel.

(k) It is recommended that Passengers insure prior to embarkation for health care abroad and for loss of baggage and/or personal property.

8. (a) The Passenger agrees to comply with all laws, decrees, regulations, ordinances, and the like in effect at any and all places at which the Vessel calls. Should the failure of any Passenger to comply with any such laws, decrees, regulations, ordinances, and the like result in the imposition of any fine or penalty upon the Carrier or the Vessel, then the Passenger shall indemnify the Carrier and the Vessel for all such fines or penalties, plus the costs and attorney's fees incurred by the Carrier or the Vessel in connection therewith.

(b) The Passenger shall be liable to and shall reimburse the Carrier for all damage to the Vessel, its furnishings, equipment, and any property of the Carrier, which damage is caused directly or indirectly in whole or in part by any willful or negligent act or omission on the part of the Passenger. In addition, the Passenger shall indemnify the Carrier or the Vessel in connection with any personal injury, death, or damage to property caused or alleged to be caused directly or indirectly in whole or in part by any willful or negligent act or omission on the part of the Passenger.

(c) The Passenger shall pay to the Carrier on demand any expenses incurred by or on behalf of the Passenger while on board or at any port, including but not limited to medical services performed by the ship's doctor and medicines or drugs supplied to the Passenger.

9. This ticket (including any detachable coupons or slips of paper attached hereto) and the Passenger Embarkation Declaration and Receipt Form which the Carrier has supplied to the Passenger constitute the entire agreement

of the parties and cannot be varied, altered, modified, or waived in any respect by any action or inaction, statement, or representation of anyone acting or purporting to act on behalf of the Carrier or the Vessel. The terms of this contract may be changed only by an express written modification to this contract, signed by the Carrier.

10. Each of the provisions, terms and conditions contained in this contract shall be severable; if any such provision, term, or condition is found to be invalid illegal, or unenforceable, the remaining provisions, terms, and conditions shall nevertheless have full force and effect.

11. The terms and conditions of this contract shall be interpreted, and its performance shall be governed, by the laws of the United States and of the State of New York, except that the laws of another jurisdiction shall apply in those cases in which the act or event giving rise to a controversy occurs at another jurisdiction or the high seas, and the laws of the relevant foreign jurisdiction afford to the Carrier of the Vessel a more favorable treatment than under the laws of the United States or of the State of New York.

BAHAMA CRUISE LINE, INC.

FILED
AUG 31 1987
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CLERK

No. 87-167

IN THE

SUPREME COURT OF THE UNITED STATES

HARRIET MAREK AND SAMUEL MAREK,
WIFE and HUSBAND,

Petitioners

v.

MARPAN TWO, INC. and
BAHAMA CRUISE LINE, INC.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTER-STATEMENT OF THE CASE

A. *Procedural Background*

The Petition accurately states the procedural background of the case.

B. *Factual Background*

Respondent disputes the accuracy only of petitioner's statement that she was not afforded time to read the ticket before boarding the vessel. There was no such assertion in petitioner's affidavit submitted to the court

below, and there is therefore no basis in the record for such assertion.

II. ARGUMENT

A. *The Petition Should Not Be Granted Because There Is No Conflict In The Circuits As To The Controlling Legal Principles.*

The legal standard which has governed the rulings of the Courts of Appeals and the district courts with respect to enforcing contractual statutes of limitations for passengers' personal injury claims has not varied from circuit to circuit. Indeed, the distinction which petitioner seeks to draw between the Second Circuit's decision in *Silvestri v. Italia Societa Per Azione di Navigazione*, 388 F.2d 11 (2d Cir. 1968), and the standard adopted by the Third Circuit in this case is merely a semantic one. After Italia substantially revised its ticket in light of *Silvestri*, the Second Circuit concluded in *McQuillan v. Italia Societia Per Azione di Navigazione*, 386 F. Supp. 462, 465-466 (S.D.N.Y. 1974), (aff'd 516 F.2d 896 (2d Cir. 1975), that the new ticket satisfied *Silvestri*. In so doing, the Second Circuit expressly endorsed the same test applied by the Third Circuit in this case, i.e. whether the contract "reasonably communicates the importance of the terms and conditions to the passenger." *Id.*, 386 F. Supp. at 465-466.[1]

Furthermore, subsequent decisions of the district courts in the Second Circuit have applied the same

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1. Although the official citation suggests that the Second Circuit affirmed the decision of the district court in *McQuillan* without opinion, the actual order of affirmance states that the judgement was "affirmed on the opinion of Judge Werker, reported at 386 F. Supp. 462." *DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 n.1 (S.D.N.Y. 1975).

standard of "reasonable communicativeness" which was applied by the Third Circuit in this case. See *Lieb v. Royal Caribbean Cruise Line, Inc.*, 645 F. Supp. 232 (S.D.N.Y. 1986), and *Cimini v. Italia Crociere International, S.P.A.*, 1981 A.M.C. 2674 (S.D.N.Y. 1981); *Raskin v. Compania de Vapores Realma*, 521 F. Supp. 337 (S.D.N.Y. 1981); *Ager v. D/S A/S DEN Norske Africa-Og Australielinie*, 336 F. Supp. 1187 (S.D.N.Y. 1972); *Lipton v. National Hellenic American Lines*, 294 F. Supp. 308 (E.D.N.Y. 1968).

The absence of any conflict in the circuits is further confirmed by the fact that the other circuits which have considered the same question have applied essentially the same standard. See *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979). Thus, there is no conflict in the circuits which would justify granting the petition for certiorari in this case.

B. *The Petition Should Not Be Granted Because There Is No Substantial Federal Question Presented By This Appeal Which Should Be Settled By This Court.*

There is no important question presented by this appeal which requires resolution by this Court. The enforcement of the one year statute of limitations in passenger contracts has been expressly authorized as a general matter by act of Congress, 46 U.S.C. §183(b)(a). The legal standard to be applied in deciding whether the passenger receives sufficient notice of the contractual period of limitations — the standard of reasonable communicativeness — is the appropriate and most workable one. The Courts of Appeals and the district courts have been applying this standard for decades, producing results which square with fairness and common sense. There is no reason why this standard should be reviewed by this Court.

Nor does application of that standard to the facts of this case warrant review by this Court. The ticket contained repeated admonitions to the passenger to read the terms and conditions of the contract carefully. These warnings were adequate to reasonably communicate the statute of limitations to the petitioner, as numerous courts have held in similar circumstances. See *DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Carpenter v. Klosters Rideri A/S*, 604 F.2d 11 (5th Cir. 1979); *Geller v. Holland-America Line*, 201 F. Supp. 508 (S.D.N.Y.) aff'd. 298 F.2d 618 (2d Cir. 1961).

Petitioner's subsidiary arguments that the warnings themselves must refer specifically to the statute of limitations and that she was given inadequate opportunity to review the contract are without merit. None of the existing caselaw requires an express reference in the warning to the statute of limitations clause or other "limitations on liability" of the carrier. Indeed, in view of the tickets' direction to the passenger to read *all* of the contract provisions, inclusion of specific terms in the warning would be surplusage at best and deceptive at worst.

The facts that the petitioner did not read the ticket and that it was retained by her friend are of no moment. The passenger who omits to read takes the risk of the omission. *Foster v. Cunard White Star, Ltd.*, 121 F.2d 12 (2d Cir. 1941). As a corollary of this, possession of the ticket by a friend is sufficient to charge the passenger with notice of its provisions. See *DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 (S.D.N.Y. 1976); *Rogers v. Furness, Withy & Co.*, 103 F. Supp. 314, 316-317 (W.D.N.Y., 1951).

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAWLE & HENDERSON

By: _____

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CERTIFICATE OF SERVICE

Douglas H. Riblet, Esquire, attorney for respondents certifies that he served a copy of this brief in opposition to petition for writ of certiorari upon petitioner's attorneys, applied to Clyde W. Waite and Barry L. Gross, 547 East Washington Avenue, Newtown, Pennsylvania 18940 on the 28th of August, 1987, by regular U.S. Mail.

_____

Douglas H. Riblet, Esquire